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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

Estate of RICHARD SOLORZANO,
Deceased.

PATRICIA HEWLETT,
Petitioner and Appellant,

v.

CARMEN MCMAHAN,
Objector and Respondent.

A151795

(San Francisco County
Super. Ct. No. PES-16-300475)

Patricia Hewlett appeals from an order appointing Carmen McMahan administrator of the estate of Richard Solorzano. We affirm.¹

FACTUAL AND PROCEDURAL BACKGROUND

Richard Solorzano (Richard) died intestate in 1996. His father Henry Joseph Solorzano (Solorzano) survived him. McMahan is Solorzano's daughter and Richard's half-sister.² Hewlett is not related to Richard, but she has a relationship with Solorzano;

¹ In her responding brief, McMahan requests we take judicial notice of an order apparently filed in a different case declaring Hewlett a vexatious litigant. This request is denied because McMahan did not file a separate motion as required by California Rules of Court, rule 8.252(a)(1). We decide the appeal on the merits.

² The parties agree that, when Richard died, he had no surviving spouse, child, grandchild, nor other issue, and Solorzano was his only surviving parent. Therefore, if competent, Solorzano would be entitled to appointment as administrator of Richard's estate under Probate Code section 8461.

in her opening brief, Hewlett describes herself as Solorzano’s “helper and personal assistant” since 2013 and “his partner for the past five years.”

On December 30, 2016, Hewlett, represented by attorney Ross Madden, filed a petition to be appointed administrator of Richard’s estate. On January 3, 2017, a “Declination to Act and Waiver of Right to Appointment,” prepared by attorney Madden and signed by Solorzano, was filed with the court. In this document, Solorzano declared that he was entitled to appointment as administrator of Richard’s estate and he “decline[d] to so act, and nominate[d] Patricia Hewlett to act in [his] stead.”

On February 1, 2017, McMahan filed her own petition to be appointed administrator of Richard’s estate. The same month, she filed a separate objection to Hewlett’s petition. In her objection, McMahan declared Solorzano was in frail health, and she had learned from San Francisco Adult Protective Services and Solorzano’s financial advisor that Solorzano was suffering with cognitive loss and that Hewlett had “taken over his life.”

On February 24, 2017, Solorzano filed a declaration with the court rescinding his earlier declination to act and opposing McMahan’s petition. Solorzano declared he was “perfectly able to as [sic] personal representative.”

A hearing on McMahan’s and Hewlett’s competing petitions to be appointed administrator of Richard’s estate was held on March 6, 2017. Attorney Madden appeared for Hewlett and informed the court that Hewlett intended to dismiss her petition and that a new petition by Solorzano would be filed. McMahan’s attorney requested a continuance and indicated that proceedings seeking conservatorship of Solorzano would be initiated soon.³

On March 7, 2017, Solorzano filed his own petition for appointment as administrator of Richard’s estate. At that time, Solorzano represented to the court that he was 95 years old.

³ Hewlett elected to proceed on appeal without reporter’s transcripts. Details of the two court hearings we describe are taken from the mini minutes in the clerk’s transcript.

On June 12, 2017, the probate court heard argument on the competing petitions. Evyn Shomer appeared at the hearing on behalf of the San Francisco Public Guardian as conservator of Solorzano. Shomer stated that the Public Guardian had been appointed conservator of Solorzano on June 1, 2017, and that it was the Public Guardian's position that Hewlett was not appropriate for appointment as estate representative in this case. Shomer reported, among other things, that Hewlett commingled funds in violation of her fiduciary duties and that the order appointing the Public Guardian as conservator specifically restricted Hewlett from contacting Solorzano.

Attorney Madden appeared for Hewlett. He informed the court that Hewlett filed her petition with Solorzano's consent prior to the order appointing a conservatorship for Solorzano. Madden stated that Solorzano's subsequent petition occurred after the conservatorship and that Solorzano was not now competent to serve as administrator.

McMahan's attorney agreed that Solorzano was not competent to serve as administrator of Richard's estate. She asserted that Hewlett was not suitable or appropriate to serve in that capacity because Hewlett was under investigation for elder abuse of Solorzano. She argued McMahan had statutory priority for appointment as administrator of Richard's estate as his sister because the only person with priority over her (Richard's father Solorzano) was not competent.

(See Prob. Code, § 8402, subd (a)(2) [a person is not competent to act as a personal representative if "[t]he person is subject to a conservatorship of the estate or is otherwise incapable of executing, or is otherwise unfit to execute, the duties of the office"].)

The probate court granted McMahan's petition to be appointed administrator of Richard's estate, "in the interest of protecting the estate." The court denied Hewlett's petition.

Hewlett represents herself in this appeal.

DISCUSSION

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "A fundamental principle of appellate

practice is that an appellant “ ‘must affirmatively show error by an adequate record. . . . Error is never presumed.’ ” ” ” (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639.) Further, “[p]ro. per. litigants are held to the same standards as attorneys.” (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.)

Hewlett appears to raise two arguments on appeal.

First, Hewlett asserts she was competent to serve as administrator of Richard’s estate because Solorzano “appointed her” in writing to administer his deceased son’s estate. The appellate record does not include the probate court’s reasoning in denying her petition, but we presume the court’s decision was correct absent a showing of error. And here there is none.

A person who is entitled to be appointed as administrator of an estate may nominate another person as administrator. (Prob. Code, § 8465, subd. (a)(1).) But a “person without understanding [can]not make a legal nomination.” (*Estate of Calhoun* (1938) 27 Cal.App.2d 706, 711.) When the probate court decided Hewlett’s petition to be administrator of Richard’s estate on June 12, 2017, the validity of Solorzano’s nomination of Hewlett was before the court. (*Ibid.*) That a court had ordered conservatorship of Solorzano was substantial evidence that Solorzano was “without understanding,” and, therefore, he could not legally nominate Hewlett. (*Ibid.*) Thus, the probate court properly could have determined that the purported nomination of Hewlett was of no legal effect. Alternatively, the court could have determined that, prior to becoming incompetent, Solorzano effectively rescinded his nomination of Hewlett by his declaration filed February 24, 2017. (See *Estate of Shiels* (1898) 120 Cal. 347, 348 [“The right to have letters issued to the nominee was the right of the widow, and not of the nominee. . . . [S]he was not precluded from withdrawing her nomination at any time before the court had acted upon it”].) Or the court could have found Hewlett was not competent to act as administrator for the reasons advocated by the Public Guardian.⁴

⁴ Under Probate Code section 8402, subdivision (a)(3), a person is not competent to act as a personal representative if there are grounds for removal under section Probate Code section 8502. This section, in turn, provides that a personal representative may be

In any event, Hewlett has not affirmatively shown the probate court erred in denying her petition to be appointed administrator.

Second, Hewlett contends McMahan is not competent to serve as administrator of Richard's estate because she is not a California resident. But Hewlett cites no authority for the proposition that an administrator must be a California resident. Previously, a Probate Code statute required an administrator to be a " 'bona fide resident of this state.' " (*Estate of Damskog* (1991) 1 Cal.App.4th 78, 80 [quoting former Probate Code section 420].) But that law was changed in 1980 to require an administrator to be a resident of the United States. (*Id.* at p. 81.) Currently, Probate Code section 8402, subdivision (a)(4), provides that a person is not competent to act as personal representative if "[t]he person is not a resident of the United States," but the statute makes no mention of state residency. Again, Hewlett has not affirmatively shown error.⁵

removed because he or she "has wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so" or because removal is "necessary for protection of the estate or interested persons." (Prob. Code, § 8502, subds. (a), (d).)

⁵ We have addressed the two issues set forth under separate headings in the discussion section of Hewlett's opening brief. In a different part of her brief, Hewlett asserts two probate court judges harbor personal bias against Hewlett. This assertion is not properly raised. (Cal. Rules of Court, rule 8.204(a)(1)(B), (C).) "The requirements that issues be raised in the opening brief and presented under a separate argument heading, showing the nature of the question to be presented and the point to be made, are part of the ' "[o]bvious considerations of fairness" ' to allow the respondent its opportunity to answer these arguments [citation] and also . . . ' "to lighten the labors of the appellate [courts] by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass." ' " (*People v. Roscoe* (2008) 169 Cal.App.4th 829, 840.) To the extent Hewlett's claim is that the judges' adverse rulings in themselves demonstrate bias, her claim fails on the merits. "The mere fact that the trial court issued rulings adverse to [Hewlett] . . . does not indicate an appearance of bias, much less demonstrate actual bias." (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 674.)

DISPOSITION

The order of June 12, 2017, appointing McMahan administrator of the estate of Richard Solorzano is affirmed. McMahan's request for judicial notice is denied.

Miller, J.

We concur:

Kline, P.J.

Richman, J.

A151795, *Hewlett v. McMahan*